

NOT DESIGNATED FOR PUBLICATION
DIVISION III

SAM BIRD, Judge

ARKANSAS COURT OF APPEALS

CA06-279

NOVEMBER 15, 2006

CAROL IKERMAN, ADMINISTRATRIX
and PERSONAL REPRESENTATIVE OF
THE ESTATE OF JAMES WESLEY
EMMET, JR., DECEASED

APPELLANT

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. CV 03-7099]

V.

HON. CHRIS PIAZZA, JUDGE

JAMES C. "KURT" DILDAY, M.D.; JAMES
C. DILDAY, M.D., P.A.;
BIOLOGICAL PSYCHIATRY
ASSOCIATES, P. A.; and DOES 1-5

APPELLEES

AFFIRMED

Appellant Carol Ikerman appeals the trial court's decision to grant summary judgment in favor of appellees James C. "Kurt" Dilday, M.D.; James C. Dilday, M.D., P.A.; Biological Psychiatry Associates, P.A.; and Does 1-5. Appellant contends on appeal that the court erred in finding that her claims for wrongful death and medical negligence were barred by the statute of limitations and in granting appellees' motion for summary judgment. We affirm.

The undisputed facts of this case are as follows. On March 22, 2002, appellant's son James Wesley Emmet, Jr., committed suicide. On June 30, 2003, appellant filed a complaint against Emmet's psychiatrist and various others, alleging medical negligence and wrongful

death. Appellant brought the complaint in her capacity as administratrix and personal representative of Emmet's estate, although she had not yet been appointed as such.

Between July 23 and July 28, 2003, appellant obtained consent from Emmet's other heirs—his wife, sons, brother, and sister—to appellant's appointment as personal representative of the estate. Appellant was appointed as personal representative of the estate on February 24, 2004, and letters of administration were filed on March 3, 2004. On March 22, 2004, the statute of limitations period for the wrongful death and medical negligence claims expired. Appellant filed an amended complaint on September 10, 2004, again in her capacity as administratrix and personal representative of the estate. The amended complaint was substantially the same as the original complaint, except that it added "James C. Dilday, M.D., P.A." as a defendant and also added a breach of contract claim.

On December 6, 2005, the trial court entered summary judgment in favor of appellees, finding that appellant's claims for wrongful death and medical negligence were barred by the statute of limitations. The judgment was accompanied by a certification under Ark. R. Civ. P. 54(b) explaining that the breach of contract claim was still at issue, but to prevent the likelihood that hardship or injustice would occur, an immediate appeal of the summary judgment on the medical negligence and wrongful death claims was necessary. Appellant now appeals.

Although a motion for summary judgment is referred to in the judgment, the complaint against appellees was dismissed due to the expiration of the statute of limitations.

Accordingly, we view the matter as an appeal from a grant of a motion to dismiss. *See Hackelton v. Malloy*, 364 Ark. 469, ___ Ark. ___ (2006). When reviewing a circuit court’s order granting a motion to dismiss, we treat the facts alleged in the complaint as true and view them in the light most favorable to the plaintiff. *Id.* In testing the sufficiency of a complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and all pleadings are to be liberally construed. *Id.* Further, if there is any reasonable doubt as to the application of the statute of limitations, this court will resolve the question in favor of the complaint standing and against the challenge. *Id.*

Appellant contends that the trial court erred in holding that her claims for wrongful death and medical negligence were barred by the statute of limitations and in granting appellees’ motion for summary judgment. Although appellant concedes that she was not appointed as personal representative of Emmet’s estate until after she filed her original complaint, she argues that her claims were not barred by the statute of limitations because she brought them “on behalf of all of the heirs at law as required by Ark. Code Ann. § 16-62-102(b) prior to the expiration of the statute of limitations.” She also points to the fact that, less than a month from the time she filed the original complaint, she obtained consent from Emmet’s heirs to her appointment as personal representative of the estate.

Appellant’s claims were clearly barred by the statute of limitations in this case. Under our existing law, appellant, having not yet been appointed as personal representative of Emmet’s estate, lacked standing to bring the original complaint, and the complaint was

therefore a nullity. Arkansas Code Annotated section 16-62-102(b) (Repl. 2005) states, “Every [wrongful death] action shall be brought by and in the name of the personal representative of the deceased person. If there is no personal representative, then the action shall be brought by the heirs at law of the deceased person.” Furthermore, Arkansas Code Annotated section 16-62-102(d) (Repl. 2005) provides that the beneficiaries of the wrongful death statute are the following: the surviving spouse, children, father, mother, brothers and sisters of the deceased person; persons standing in loco parentis to the deceased; and persons to whom the deceased stood in loco parentis. In *Brewer v. Poole*, 362 Ark. 1, ___ S.W.3d ___ (2005), our supreme court explained that “heirs at law” under Ark. Code Ann. § 16-62-102(b) are the same as the statutory beneficiaries under Ark. Code Ann. § 16-62-102(d).

A person does not have standing to bring a wrongful death action when that person has not yet been appointed as personal representative of the estate and that person is not the sole heir at law of the deceased. *See Hackelton, supra*. Furthermore, when there is no personal representative and a wrongful death complaint fails to list all of the “heirs at law” as parties to the lawsuit, the complaint is a nullity. *See Brewer, supra*.

In the case at bar, appellant filed her original complaint on June 30, 2003. Appellant had not yet been appointed as the personal representative of her son’s estate at the time she filed this complaint, nor were all of the statutory beneficiaries, or “heirs at law,” made parties to the complaint. It was not until eight months later, on February 24, 2004, that appellant was actually appointed as personal representative of the estate. The facts that appellant brought

the original complaint “on behalf” of Emmet’s other heirs and that she obtained their consent to her appointment as personal representative less than a month after filing the complaint are immaterial. Based on our existing law, appellant lacked standing to bring the original complaint at the time it was filed, and the complaint was a nullity.

Although appellant was appointed as personal representative of Emmet’s estate prior to the expiration of the statute of limitations in this case, she made no attempt to amend her original, null complaint until after the statute of limitations expired. In fact, she waited until September 10, 2004—nearly six months after the statute of limitations expired—to amend the complaint. Appellant now argues that “the purposes of the wrongful-death statute [would] not be offended if [this court] permits relation back of Ms. Ikerman’s appointment as Administratrix and Amended Complaint to the date of filing of the original Complaint.” She also argues that, under Rules 15 and 17 of the Arkansas Rules of Civil Procedure, her claims relate back to the filing of the original complaint. In addition, she points out that “federal appellate courts and other state courts have permitted relation back of amendments to pleadings adding new plaintiffs.” Because our case law clearly holds otherwise, we must reject these arguments.

Where the original complaint is a nullity, Rules 15 and 17 of the Arkansas Rules of Civil Procedure are inapplicable because the original complaint never existed; thus, there is no pleading to amend and nothing to which an amendment can relate back. *See Brewer, supra. See also Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85 (2002); *St. Paul Mercury Ins.*

Co. v. Circuit Court of Craighead County, 348 Ark. 197, 73 S.W.3d 584 (2002). That is exactly the case here—the original complaint was a nullity; thus, there was no complaint to amend and nothing to which the amended complaint might relate back. Because the statute of limitations had expired at the time that appellant filed her amended complaint, the action was time-barred. We therefore affirm the trial court’s decision; we need not look to other state and federal cases, as appellant suggests, to reach our conclusion.

Affirmed.

GLADWIN and ROAF, JJ., agree.